



Chesapeake Bay Program
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**STAC COMMENTS ON SECTION 10.1, SECTION 10.2, and APPENDIX S OF EPA'S
DRAFT CHESAPEAKE BAY TMDL**

I. General Comments

- a. Flexibility allows States to Innovate. We support EPA's efforts to build flexibility into the proposed TMDL. In general, STAC recommends that this document be broader rather than more specific to help with the goal of developing workable and innovative state programs. Such an approach should allow states to develop programs that meet broad environmental goals in the manner they know best. Flexibility should enable states to pursue innovative program designs.
- b. Periodic Evaluation of ALL Program Approaches. STAC recommends that all approaches and tools, including water quality trading, designed to meet the TMDL's goals be periodically evaluated. "Water Quality Credit Trading: Issues in Uncertainty, Evaluation, and Verification," <http://www.chesapeake.org/stac/Pubs/nutrient%20trading%20evaluation.pdf> is a resource document developed by STAC for this purpose. STAC believes that based on such an evaluation, EPA can adapt its management according to the experiences of the jurisdictions.
- c. NPDES permitting for Point Sources and Incentives. Under current NPDES requirements (as interpreted by Maryland and Virginia) point-to-non-point trading or offsets are unlikely to occur. Under current rules, point sources find that the risk of permit violations overwhelms trading benefits. EPA needs to more carefully consider the incentives for municipal wastewater plants to participate in a point-to-non-point trading or offsets program, and incorporate language in the document to increase incentives for these entities.
- d. Additional Legal Issues and Uncertainties. The "net improvement offsets" provision found in §10.1.3 (Additional Offset Program Features) appears to state that jurisdictions would be required to levy a tax or fee on point sources to ensure net improvements. The TMDL rules need to clarify that a regulatory agency may be on questionable grounds if it attempts to levy a tax on point sources to pay for non-point source improvements. When EPA begins to discuss net improvement offsets in this way, it is moving from the realm of a trading program to a tax program. This may raise a legal issue if the jurisdiction is an administrative agency because administrative agencies do not have taxing authority. The

document could be improved by making it clear that the authority to do net improvement offsets must come from a legislative body, not a regulatory agency.

II. Specific Comments

- a. 10.1.1 Designating Target Loads for New or Increased Sources. Sentence 2

Comment: Define “independent oversight.” What are the expectations? Who can conduct such oversight? Many programs have third party oversight but they are contracted by the brokers. Would that qualify as “independent”?

- b. 10.1.2 Offset Programs. Paragraph 2. Sentence 1

Comment: Define the ambiguous phrase: “public oversight.”

- c. 10.1.4 EPA’s Oversight Role of State Offset Program. Paragraph 2. Sentence 2.
“Such oversight generally will be conducted on a programmatic basis, not an individual offset basis.”

Comment: Does USEPA have reasonable assurance that its future budget will permit such a programmatic review?

- d. Appendix S. II. Definitions. 4. New or Increased loading

Comment: This definition is ambiguous. Does this definition imply that there can’t be any new non-point source without offsets to its loadings? For example, this definition implies that no new animal feeding operations would be allowed without sufficient offsets to balance its expected loadings. The definition could also restrict cropping changes with higher than current loads. Thus, could moving to vegetable production from another less intensive loading crop be allowable?

- e. III. Common Elements, 5. Credit Calculation and Verification, iv. Accounting rules for inclusion of practices implemented through public cost-share incentives

Comment: This section is vague and ambiguous. Will these practices be treated differently than others? Can expected nutrient savings be traded?

- f. III. Common Elements, 6. Safeguards, (d) Ensuring temporal consistency between the period when a credit or offset is generated and when it is used

Comment: What does it mean when it is stated that “offset is generated”? Is the offset generated when it is installed, or when the quality of the receiving water body is improved?

- g. III. 6. Safeguards (c) Protecting affected communities from disproportionate harm arising from offsets

Comment: This phrase is not well defined and is open to multiple interpretations. Does “disproportionate harm mean poorer water quality in “hot spots,” or some other negative impact or cost? The phrase should be defined more specifically.

- h. III. 7. Certification and Enforceability. (a) Requiring that any offsets, along with the enforceable water quality-based effluent limits (WQBELs) based on the applicable WLA (e.g., zero for new dischargers), will be included and recorded in the NPDES permit

Comment: For trading programs to be attractive and feasible for permitted point sources, there must be flexibility by EPA in oversight of state programs. The statement in (f) “Ensuring that an NPDES permittee remains accountable for meeting the WQBEL(s) in its permit” appears to be inconsistent with the goal of enabling successful long-term offsets.

- i. III. Common Elements 7. Certification and Enforceability. (d) Ensuring that transactions can be enforced by the jurisdiction or otherwise insured by the jurisdiction, for example through a credit reserve insurance account, in the event of failure by the offset generator.

Comment: Within the purview of EPA administrative actions, who is responsible for the risk of failure/noncompliance?

Sincerely submitted on behalf of STAC,



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